Petition

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

BUREAU OF ECONOMIC ANALYSIS,
UNITED STATES DEPARTMENT OF COMMERCE,
PETITIONER

v.

SUSAN B. LONG AND PHILIP H. LONG

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

This Freedom of Information Act suit against the Bureau of Economic Analysis of the United States Department of Commerce seeks the disclosure of source documents of the Internal Revenue Service's Taxpayer Compliance Measurement Program, which are used or could be used to establish that agency's audit selection formulae.

The question presented is whether the documents at issue are "matters that are * * * specifically exempted from disclosure by statute" (Exemption 3) as a result of the enactment of Section 701 of the Economic Recovery Tax Act of 1981.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Statement	2
1. The IRS suit	4
2. The proceedings in this case	5
Reasons for granting the petition	6
Conclusion	8
Appendix A	1a
Appendix B	27a
Appendix C	34a
Appendix D	35a
Appendix E	44a
Appendix F	49a
Appendix G	50a

TABLE OF AUTHORITIES

Cases:

Internal Revenue Service v. *Fruehauf Corp.*, 429 U.S. 1085	8
NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132	5

Statutes and regulation:

Internal Revenue Code of 1954 (26 U.S.C.):

Section 6103 (1970 ed.)	4
Section 6103 (& Supp. III)	2, 5, 44a
Section 6103(b)(2)	4, 6, 45a
Section 7701(a)(11)(B)	7

Statutes and regulation—Continued Page

Economic Recovery Tax Act of 1981, 95 Stat. 172.. 44a
Section 701 .....6, 7, 44a
Section 701(a) 6
Freedom of Information Act:
5 U.S.C. (1970 ed.) 552(b)(3) 4
5 U.S.C. (& Supp. III) 553 ..... 2, 46a
5 U.S.C. 552(b)(3) 2, 4, 47a
Treasury Regulations, Section 301.6103(a)-104 (26 C.F.R.) (1978) 5

Miscellaneous:

H.R. Conf. Rep. No. 97-215, 97th Cong., 1st Sess. (1981) 8
H.R. Rep. No. 97-201, 97th Cong., 1st Sess. (1981).. 7-8
Treasury Department Order No. 150-37 (Mar. 17, 1955) 7

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SUSAN B. LONG AND PHILIP H. LONG

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Bureau of Economic Analysis, United States Department of Commerce, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the district court granting summary judgment (App. B, *infra*, 27a), its injunctive order of January 12, 1981 (App. B, *infra*, 28a-29a), its order of January 15, 1981, denying petitioner's motion for reconsideration (App. B, *infra*, 30a), and its order of February 6, 1981, denying petitioner's

motion to vacate its injunctive order and to reconsider its denial of petitioner's motion for leave to amend its answer (App. B, *infra*, 31a-33a), are not reported. The order of the court of appeals affirming the judgment of the district court (App. A, *infra*, 25a-26a) is not officially reported. The opinion of the court of appeals (App. A, *infra*, 1a-24a) is reported at 646 F.2d 1310.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1981 (App. C, *infra*, 34a). On July 24, 1981, Justice Rehnquist extended the time within which the Bureau of Economic Analysis could file a petition for a writ of certiorari to and including September 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954, 26 U.S.C. (& Supp. III) 6103, as amended by Section 701 of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 340, and the Freedom of Information Act, 5 U.S.C. 552(b)(3) are set forth in Appendix E, *infra*, 44a-48a.

STATEMENT

This litigation against the Bureau of Economic Analysis under the Freedom of Information Act, 5 U.S.C. (& Supp. III) 552 (FOIA), has its roots in an earlier action brought by respondents against the Internal Revenue Service under FOIA in the United States District Court for the Western District of Washington, to compel the Service to disclose various documents pertaining to its Taxpayer Compliance

Measurement Program (TCMP). Although this suit is nominally against the Bureau of Economic Analysis, the real party in interest is the Internal Revenue Service because respondents seek the production of the Service's TCMP source documents recorded on computer tapes.[1]

The TCMP is a statistical investigatory technique devised by the Internal Revenue Service and put into operation in 1962 in order to measure the level of compliance with the federal tax laws (III-R. 668).[2] Under the TCMP, a random sample of approximately 50,000 individual tax returns is selected for intensive audit. The information on the tax returns and the tax changes determined by the TCMP audits are thereafter entered on "checksheets" and computer data tapes (I-R. 22-23).

The information collected from the various returns subjected to TCMP audit forms the statistical data base of the Internal Revenue Service's discriminant function scoring system. This system is used to assign ratings ("scores") to individual tax returns in order to identify those returns that have a high tax change potential. The discriminant function scoring system is developed from correlations between the amount of audit change and the items ap-

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[1] The only significant difference between the tapes at issue in this case and those at issue in the *IRS* case is that some details directly identifying the individual taxpayers from whose returns the same material was obtained have been deleted from the tapes in this case. This case also involves tapes created subsequent to commencement of the *IRS* suit.

[2] "R." refers to the six volume duplicated record filed in the court of appeals in the *IRS* case. At the time we sought certiorari in *Internal Revenue Service* v. *Long*, No. 79-1269, 1979 Term, we lodged a copy of that record with the Clerk.

pearing on the returns subject to TCMP audit. There is a high statistical probability that returns receiving a high score, based upon the use of the discriminant function formulae, have a substantially greater potential for tax change than returns with lower scores. Accordingly, the formulae are a valuable objective enforcement technique employed by the Service to select for audit the returns of those persons who are most likely to have understated their tax liability (III-R. 670).

1. *The IRS Suit.* Respondents originally sought the production under the Freedom of Information Act of the TCMP source documents from the Internal Revenue Service. Those documents consist of the computer data tapes and the related TCMP checksheets. The tapes generally contain tax and audit information identical to that contained in the checksheets. While the taxpayers' names and addresses are not on the tapes, the tapes do contain taxpayers' social security numbers. Respondents did not demand the identities of individual taxpayers but requested that such identifying information be deleted. The district court granted summary judgment for the Internal Revenue Service as to the TCMP "checksheets" and data tapes.

Subsequent to the district court's decision, Exemption 3 of the Freedom of Information Act, 5 U.S.C. (1970 ed.) 552(b)(3), and 26 U.S.C. (1970 ed.) 6103 were both amended.[3] The parties agreed, and

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[3] One of the changes in 26 U.S.C. (1970 ed.) 6103, the so-called "Haskell Amendment," provides that "return information" (which is prohibited from disclosure) "does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer" (26 U.S.C. 6103(b)(2)).

Exemption 3 of the FOIA was amended to require that the statute prohibiting disclosure either require that the matters

the court of appeals held, that the case was governed by the amended versions of the statutes (596 F.2d 362, 365 & n.2 (1979)). The court of appeals reversed and remanded the case for further proceedings (596 F.2d 362-370 (1979)). On April 28, 1980, this Court denied the Internal Revenue Service's petition for certiorari (446 U.S. 917). The case was thereupon remanded to the district court for further proceedings, where it is still pending.

2. *The Proceedings in this Case.* Shortly after the *IRS* case was argued in the court of appeals, respondents brought this FOIA suit against the Bureau of Economic Analysis (BEA), United States Department of Commerce, in the same district court (Western District of Washington) where they had earlier commenced their suit against the Internal Revenue Service. The case was assigned to the same district judge who heard the *IRS* case. As in the *IRS* case, respondents sought disclosure of the TCMP data, this time the computer tapes which the IRS had supplied to the BEA, pursuant to Section 6103 of the Code and Treasury Regulations, Section 301.6103(a)-104 (26 C.F.R.) (1978), for use in preparing statistical economic analyses. Prior to transmitting these tapes to the BEA, the IRS had removed the names and social security numbers of the taxpayers involved (App. A, *infra*, 3a-4a; App. E, *infra*, 45a).

While the *IRS* case was under submission in the court of appeals, respondents moved for summary judgment in the *BEA* case. Despite the fact that the

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be withheld in such a manner as to leave no discretion on the issue, establish particular criteria for withholding, or refer to particular types of matters to be withheld (see App. E, *infra*, 47a). See also *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 165 (1975).

principal case brought by respondents against the IRS was still pending with unresolved issues before the district court as of December 31, 1980, that court nevertheless then entered summary judgment in this case for respondents on the ground that the BEA had not sought a timely amendment of its answer to raise the defenses that the court permitted to be raised in the *IRS* case. The district court held that the court of appeals' decision in the *IRS* case was controlling (App. B, *infra*, 27a) and entered an injunction ordering the BEA to release the TCMP tapes to respondents. The court of appeals entered an order affirming the district court's order of disclosure of the TCMP tapes (App. A, *infra*, 25a-26a) and shortly thereafter issued a written opinion (App. A, *infra*, 1a-24a).

REASONS FOR GRANTING THE PETITION

Since the court of appeals' decision, the President signed into law the Economic Recovery Tax Act of 1981 on August 13, 1981. The new legislation clarifies the rules regarding disclosure of the types of Internal Revenue Service documents that are the subject of respondents' FOIA suit.

Section 701(a) of the Act bars disclosure of the documents sought by respondents in this case. It has amended Section 6103(b)(2) by adding at the end of that provision the following new sentence: "Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seri-

ously impair assessment, collection, or enforcement under the internal revenue laws" (see App. E, *infra*, 45a). On August 14, 1981, the Commissioner of Internal Revenue, acting pursuant to Section 7701(a)(11)(B) of the Internal Revenue Code of 1954 and the authority vested in him by the Secretary of Treasury in Treasury Department Order No. 150-37 (Mar. 17, 1955), made the requisite determinations under the statute that the data sought by respondents were used or could be used to establish standards for the selection of returns for examination and that the disclosure of the TCMP data at issue here would seriously impair assessment, collection and enforcement under the internal revenue laws (see App. F, *infra*, 49a).

Section 701 governs this case because it applies to disclosures after July 19, 1981. See Section 701(b). The legislative history shows that in enacting Section 701, Congress sought to eliminate any doubt concerning the disclosure of TCMP data sought by respondents in this suit. As the pertinent House Ways and Means Committee Report (H.R. Rep. No. 97-201, 97th Cong., 1st Sess. 239 (1981)) stated, "Congress never intended to permit public disclosure of information that would seriously compromise the integrity of the Federal tax system" (see App. G, *infra*, 52a). The committee report specified (H.R. Rep. No. 97-201, *supra*, at 239) that the "bill makes it clear that such information (*including any such information that is being sought in any pending litigation*) is protected under the disclosure provisions of the tax law" (emphasis added) (see App. G, *infra*, 53a). Indeed, the House Committee specifically referred to this case as an example of pending litigation that would be affected by the enactment of

Section 701 (H.R. Rep. No. 97-201, *supra* at 238 n.2) (see App. G, *infra*, 52a n.2). The conference report adopted the House version of Section 701 in order to resolve "whether the IRS can legally refuse to disclose information which is used to develop standards for auditing tax returns" (H.R. Conf. Rep. No. 97-215, 97th Cong., 1st Sess. 264 (1981)) (see App. G, *infra*, 56a).

It is therefore beyond dispute that the enactment of Section 701 has now resolved the major public question of disclosure of TCMP source documents in favor of the government. In light of this new legislation, all of the documents sought by respondents are now "matters that are * * * specifically exempted from disclosure by statute" under Exemption 3 of the FOIA.

In these circumstances, the appropriate course would be for the Court to grant the petition for certiorari, vacate the judgment of the court of appeals and remand the case to that court for reconsideration in light of Section 701 of the Economic Recovery Tax Act of 1981. A similar course of action was taken by the Court in *Internal Revenue Service* v. *Fruehauf Corp.*, 429 U.S. 1085 (1977).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

AUGUST 1981

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-3090

D.C. No. CV 78-176

SUSAN B. LONG AND PHILIP H. LONG,
PLAINTIFFS-APPELLEES

vs.

BUREAU OF ECONOMIC ANALYSIS,
UNITED STATES DEPARTMENT OF COMMERCE,
DEFENDANT-APPELLANT

Filed May 14, 1981

Argued and Submitted: April 30, 1981

Decided: May 4, 1981

Appeal from the United States District
Court for the District of Western Washington
Walter T. McGovern, District Judge, Presiding

Before: TANG, SKOPIL, and CANBY, Circuit Judges

OPINION

PER CURIAM:

Ultimately at issue in this Freedom of Information Act case is whether the Bureau of Economic Analysis ("BEA") is obligated to release to Susan and Philip Long certain computer tapes, now in the BEA's possession, that were prepared by the In-

ternal Revenue Service in connection with its Taxpayer Compliance Measurement Program ("TCMP"). On the basis of the record before us, we affirm the district court's rulings that FOIA's Exemption 3 did not bar disclosure and that the BEA was not entitled subsequently to amend its answer to assert additional defenses to disclosure.

I. PROCEEDINGS BELOW

The Longs' pursuit of TCMP data tapes has encompassed three different lawsuits and a span of seven years. We begin our analysis by reviewing the tortuous history of proceedings that has led to the present appeal by the BEA.

In 1975, after exhausting administrative remedies, the Longs filed an FOIA suit against the Internal Revenue Service ("IRS") seeking TCMP data tapes for Phases II, III, and IV.[1] The IRS objected to

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[1] The Taxpayer Compliance Measurement Program is a continuing series of statistical studies by the IRS on a national scale to measure the level of compliance with the federal tax laws. TCMP data consist of a random sample of taxpayers chosen by their identification numbers, and the taxpayers are thereafter subjected to comprehensive audits by the Internal Revenue Service. *See, e.g., United States* v. *Flagg*, 634 F.2d 1086 (8th Cir. 1980); *United States* v. *First National Bank in Dallas*, 635 F.2d 391 (5th Cir. 1981). TCMP source material consists of check sheets and data tapes, containing information on the check sheets. Each check sheet contains information from an individual taxpayer's tax return, including the taxpayer's name, address, social security number, and all financial data reported on the return on an item-by-item basis. A check sheet also contains additional information obtained by a comprehensive audit of the return showing the amounts that the IRS determines should have been reported.

TCMP is divided into several "phases" and "cycles." In the *IRS* proceedings, the Longs sought access to data from

disclosure, contending that the records were exempt under FOIA's Exemption 3 and 26 U.S.C. § 6103 and that the tapes contained taxpayer identification data, the deletion of which would be unreasonably burdensome. The district court granted summary judgment for the IRS, and the Longs appealed. *See Long* v. *Internal Revenue Service*, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980).

While this appeal was pending, the Longs brought a second FOIA suit against the IRS to obtain documents showing the layout of TCMP tapes. *Long* v. *IRS*, No. C76-901S (W.D. Wash. 1976). The IRS turned over certain documents and moved to dismiss the case as moot. The district court denied the motion to dismiss and ordered discovery into the extent of the IRS's search for records. After discovery, the Longs obtained copies of core record layouts showing that IRS had prepared for the BEA copies of TCMP

Phases II, III, and IV. These phases are the Delinquent Returns Survey of Nonfarm Business, the Individual Returns Filed Survey, and the Corporate Returns Filed Survey, respectively. Each phase is divided into several cycles, denoting the year the return was filed. The computer tapes at issue in the *IRS* proceedings contained the information from the check sheets, with the exception of the taxpayer's name and address. *See Long* v. *Internal Revenue Service*, 596 F.2d 362, 364 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980).

The tax reported and tax change figures are "blown up," using statistical weighting techniques, to estimate both the total tax reported and total tax changes. The data collected from the surveys form the data base for the development of the IRS's discriminant function (DIF) scoring system. The DIF system is used to score individual and corporate tax returns in a manner which identifies those returns that have a high tax change potential. Returns receiving a high score are more likely to be audited.

tapes for Phase III, Cycles 1-5 with the taxpayers' individual identities deleted.[2]

Having discovered the existence of these edited tapes, the Longs requested copies of these tapes from the BEA in September 1977. The BEA Director denied the request on the ground that FOIA's Exemption 3 and 26 U.S.C. § 6103 barred disclosure. The agency also informed the Longs that the district court's decision in the Longs' first suit against the IRS barred disclosure.

On March 22, 1978, the Longs filed the present FOIA suit against the BEA, seeking (1) a declaration that they were entitled to inspect and copy the requested records, (2) a permanent injunction against the BEA to prevent its withholding of TCMP data, (3) expedition of proceedings pursuant to 5 U.S.C. § 552(a)(4)(D), and (4) attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E).

The BEA's answer asserted, among other things, that plaintiffs' claims were barred by collateral

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[2] The IRS provided the BEA with edited tapes containing early data from TCMP Phase III (Individual Returns Filed Survey). The BEA utilizes these data to estimate the total national income account. The following table shows the cycles at issue in this case and the tapes from each cycle possessed by the BEA.

Cycle	Tax Year	No. of Tapes	% of BEA Tapes
1	1963	17	29
2	1965	15	26
3	1969	17	29
4	1971	4	7
5	1973	5	9
6	1976	none	0
7	1979	none	0
Totals		58	100%

estoppel, but did not specify a particular FOIA exemption as an affirmative defense.

After preliminary discovery, the Longs moved for partial summary judgment on February 20, 1979, seeking a determination that the edited tapes were disclosable and an injunction requiring the BEA to produce the Phase III, Cycle 1-5 TCMP tapes in the BEA's possession. The motion was based on the pleadings, answers to interrogatories, request for admissions, and the first declaration of Susan Long.

On March 26, 1979, the BEA filed its opposition to the motion along with two affidavits: the one of James Swartzwelder, planning officer of the IRS Research and Operations Analysis Division and chairperson of the TCMP, and the other of Robert Parker, Chief of the National Income and Wealth Division of the BEA.

On May 2, 1979, while the motion was pending, this court rendered its decision in *Long* v. *Internal Revenue Service*, 596 F.2d 362 (9th Cir. 1979), the Longs' first action. We held that the TCMP tapes were "records" under the FOIA and were not categorically exempt under FOIA's Exemption 3 and 26 U.S.C. § 6103, as amended by the 1976 Haskell Amendment. The IRS's argument that deletion of direct identifying date was an unreasonable burden was squarely rejected. The judgment of the district court was vacated and the cause remanded for a determination whether "disclosure of TCMP source data [would entail] a significant risk of indirect identification [of individual ta[illegible]ayers]." *Id.* at 367. In a footnote, the court noted:

> Some useful information which does not identify particular taxpayers may nonetheless be exempt

> from disclosure under the FOIA by virtue of some other exemption. For example, exemption 7(E) permits withholding of investigatory records compiled for law enforcement purposes which disclose investigative techniques and procedures. However, in this case the IRS has not raised any other exemptions which might prevent disclosure of this information.

Id. at 368 n.6.

On June 7, 1979, the Longs filed a supplemental motion for summary judgment in the *BEA* proceedings, arguing that the Ninth Circuit's *IRS* decision compelled release of the BEA's edited tapes and that, although Parker's affidavit filed in opposition to their motion for summary judgment alluded to a potential indirect identifier issue, the affidavit should be stricken under Fed. R. Civ. P. 56(e) because information in the affidavit was not based on the affiant's personal knowledge of the issue. The BEA responded and again argued that the motion should be held in abeyance, this time because a petition for rehearing was likely to be filed in the *IRS* case.

The summary judgment motion was continued by several orders of the district court. On September 7, 1979, the court entered an order taking the motion under advisement.

In September 1979, the IRS filed a petition for rehearing, and, taking heart in footnote 6 of our *IRS* decision, argued that FOIA's Exemption 7(E), 5 U.S.C. § 552(b)(7)(E), should bar release of the TCMP data. This court concluded that the IRS's "law enforcement" argument was untimely and denied the petition on September 27, 1979. The IRS's suggestion for rehearing en banc was denied on November 9, 1979.

In November 1979, the Longs instituted procedures to depose Robert Parker regarding matters stated in his affidavit. The BEA countered by moving for a protective order, asserting this time that the IRS was likely to petition for certiorari in the *IRS* case and that the deposition would be a waste of time and money. The district court declined to act on the motion, and in March 1980, Parker was deposed. His deposition showed that he had no personal knowledge as to whether taxpayers could be indirectly identified if TCMP data were released and that he only had a general understanding or assumption that the IRS did not want to disclose the data, because "there [was] a possibility of people finding out [the] identit[ies] of individual taxpayers . . . ."

The IRS petitioned for certiorari, dropping its § 6103 defense, but seeking an order directing the Ninth Circuit to remand the case to the district court with instructions to consider Exemptions 2 and 7(E) of the FOIA, 5 U.S.C. § 552(b)(2), 7(E). On April 28, 1980, the Supreme Court denied the petition and the matter was returned to the district court for further proceedings. *See Internal Revenue Service* v. *Long*, 446 U.S. 917 (1980).

In late August 1980, the IRS moved to amend its anwer in the *IRS* proceedings to raise three new defenses to disclosures: Exemption 2; Exemption 7(E); and the district court's inherent equity power to refuse disclosure even in the absence of a specific FOIA exemption. The motion was granted on October 17, 1980. The BEA did not move to amend its answer at this time, nor did it seek to consolidate the *IRS* case with the *BEA* proceedings.

On December 31, 1980, some 33 months after the filing of the complaint in the *BEA* case and 22 months after the filings of the Longs' motion for partial summary judgment, the district court granted the Longs' motion for partial summary judgment, determining that *Long* v. *Internal Revenue Service*, 596 F.2d 362 (9th Cir. 1979), was controlling. On January 12, 1981, the court entered an injunction ordering the BEA to release copies of the TCMP tapes by January 30, 1981.

On January 12, 1981, apparently before receiving notification of the district court's injunctive order, the BEA filed a "Motion for Reconsideration and for Stay of Proceedings or Amendment." By this motion, the BEA requested that the court reconsider and vacate its order of December 31, 1980 and hold further *BEA* proceedings in abeyance pending resolution of the *IRS* case then on remand to the district court. Although not submitting a proposed answer at the time, the BEA as a second alternative requested that it be permitted to amend its answer as the IRS had done previously.

On January 15, 1981, the district court entered a minute order denying the BEA's January 12 motion. The order did not directly refer to the BEA's alternative request that it be permitted to amend; however, denial of that request was implicit in view of the district court's denial of the other aspects of the BEA's motion.

The parties thereafter stipulated to a February 6, 1981 release date, thus extending the January 30 deadline imposed by the district court on January 12, 1981.

On February 2, 1981, the BEA moved the district court to vacate its January 12 injunctive order, to grant reconsideration of the denial of leave to amend, and, in the alternative, to grant a stay of *BEA* proceedings pending resolution of *IRS* proceedings. As a second alternative, BEA requested a stay of the injunction pending appeal to the Ninth Circuit. For the first time, BEA submitted a proposed amended answer, adding the three new defenses raised in the *IRS* proceedings. By way of a separate motion filed on the same date, BEA sought consolidation of the *BEA* and *IRS* proceedings. The Longs filed their opposition to the BEA's motions and, on February 5, 1981, the BEA filed its response.

The February 6, 1981 release date arrived, and the BEA immediately appealed the orders of December 31, 1980, January 12, 1981, and January 15, 1981. On the same date, the district court entered an order denying the BEA's February 2 motion for reconsideration, amendment, and stay of proceedings, but granting a limited ten-day stay pending application to this court for a stay pending appeal. The court also entered a minute order denying the motion for consolidation.

This appeal was docketed on the same date, along with the BEA's emergency motion for stay pending appeal.

On February 12, 1981, the BEA filed another notice of appeal under the same docket number, including in its request for review the district court's February 6 order denying the BEA's motion for reconsideration.

BEA was eventually granted a stay by the Supreme Court on March 9, 1981. Proceedings on appeal were thereafter expedited by this court, cul-

minating in oral argument by telephone conference call on April 30, 1981.[3]

II. JURISDICTION

Our jurisdiction over the district court's orders of December 31, 1980 and January 12, 1981 is clear. Both the Longs and the BEA have characterized these orders as appealable under 28 U.S.C. § 1291 in light of the practical finality of the district court's injunctive order requiring disclosure. We agree, but also note jurisdiction to review the January 12 order under 28 U.S.C. § 1292(a)(1), a review that carries with it all previous orders and rulings to the extent they are subsumed into the appealed ruling. 9 *Moore's Federal Practice* ¶ 110.25[1] at 270-71 (2d ed. 1980).

Turning to the January 15 order, however, the Longs argue that the district court's ruling on the BEA's motion for reconsideration of the December 31 order granting partial summary judgment, for leave to amend, and for stay of further *BEA* proceedings was not a final judgment under 28 U.S.C. § 1291, nor an appealable interlocutory order under 28 U.S.C. § 1292. The Longs thus seek to limit our review to the Exemption 3 issue and to insulate from review the question whether the district court erred in denying leave to amend.

It is true that an order refusing to permit amendment of pleadings, refusing to reconsider an earlier interlocutory order granting partial summary judgment, and refusing to stay a court's own proceedings

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[3] On May 4, 1981, due to the need for immediate action, we entered an order setting forth our decision on each of the issues on appeal and stating that this opinion would follow. This opinion was filed on May 14, 1981.

is not *independently* appealable. The critical element here, however, is that the January 15 order is not before us in isolation. Rather the order is inextricably intertwined with the patently reviewable grant of injunctive relief that was an inevitable "next step" to the court's ruling on the Longs' motion for partial summary judgment. *See* 5 U.S.C. § 552(a)(4)(B).

A determination that we are without jurisdiction to review the January 15 order would fly in the face of notions of judicial economy and the sound administration of justice. *See Yamamoto* v. *Omiya*, 564 F.2d 1319, 1325 n.11 (9th Cir. 1977). The district court's denial of leave to amend, its refusal to reconsider and vacate its determination that the tapes were disclosable, and its refusal to stay proceedings pending resolution of the *IRS* proceedings are interrelated with one another and with the December 31 and January 12 orders. Moreover, absent this court's review of the amendment issue, BEA, as a practical matter, is denied meaningful appellate review. *See Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-54 (1964).

The Longs next argue that the February 6 order is not properly before us, asserting that the BEA's February 6 notice of appeal divested the district court of jurisdiction to subsequently enter its order a few hours or minutes later. The Longs characterize the order as void, argue that there can be no appeal from a void order, and request dismissal of the BEA's February 12 appeal.

To analyze this contention, it is first necessary to characterize the February 2 motion. Because the motion was not served within ten days of the appealable January 12 injunctive order, the motion can

properly be characterized only as one seeking relief under Fed. R. Civ. P. 60(b). *See Rodriguez* v. *Southern Pacific Transportation Co.*, 587 F.2d 980, 981 (9th Cir. 1978); *Merrell-National Laboratories, Inc.* v. *Zenith Laboratories, Inc.*, 579 F.2d 786, 790-91 (3d Cir. 1978). A Rule 60(b) motion, unlike a Rule 59 motion, does not toll the time for taking an appeal from the order upon which reconsideration is sought nor divest that order of its finality. *See Browder* v. *Director, Department of Corrections*, 434 U.S. 257, 264 (1978); Fed. R. App. P. 4(a)(4).

In this circuit, the rule has generally been stated that the filing of a notice of appeal divests the district court of jurisdiction to dispose of the motion after an appeal has been taken, without a remand from this court. *See Smith* v. *Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979); *Crateo, Inc.* v. *Intermark, Inc.*, 536 F.2d 862 (9th Cir.), *cert. denied*, 429 U.S. 897 (1976); *Canadian Ingersoll-Rand Co.* v. *Peterson Products*, 350 F.2d 18 (9th Cir. 1965). To seek Rule 60(b) relief, the proper procedure is to ask the district court to indicate whether it wishes to entertain the motion, or to grant it, and then move this court, if appropriate, for remand of the case. *Smith* v. *Lujan*, 558 F.2d at 1307.

Other circuits have disagreed and determined that during the pendency of an appeal a district court has jurisdiction to consider a Rule 60(b) motion and, if it finds the motion to be without merit, to enter an order denying the motion from which an appeal may be taken. However, even these circuits have determined that, if the court is inclined to grant the motion, the movant should first request the court of appeals to remand the case so that a proper order

can be entered. *See Pioneer Insurance Co.* v. *Gelt*, 558 F.2d 1303, 1311-12 (8th Cir. 1977); *Lairsey* v. *Advance Abrasives Co.*, 542 F.2d 928 (5th Cir. 1976). This limitation on district court jurisdiction prevents the appellate court from being confronted with an uncontrollable moving target.

Yet another circuit has determined that, at least where the appeal has not yet been docketed in the appellate court, the district court retains jurisdiction in certain circumstances to entertain a Rule 60(b) motion. *See Williams* v. *McKenzie*, 576 F.2d 566, 570 (4th Cir. 1978).

In the present case, we are confronted with the unique circumstance that four events all occurred on the same day, February 6, 1981: the stipulated release date for the TCMP data arrived; the BEA's appeal was filed in the district court; the district court filed and entered its order denying reconsideration; and the appeal was docketed in this court. Moreover, the district court's order did not alter the stance of this litigation, other than to provide additional source material explaining the district court's reasoning in denying this and prior motions of the BEA. Under the particular facts here, we hold that the district court was not divested of jurisdiction to deny the motion because of fortuity of the docketing in the district court and this court. On these facts, our determination is not inconsistent with the *Lujan* line of cases, nor inconsistent with principles of sound judicial administration. The district court's action in no way confronted this court with a moving target in the appellate process and instead illuminates the reasoning underlying the district court's prior determinations and eliminates any possible deficiency in

the court's prior order of January 15, which failed expressly to address the BEA's request for amendment of its answer. The BEA's February 12 appeal properly brings that order before us for review.

III. THE FREEDOM OF INFORMATION ACT: EXEMPTION 3

The Freedom of Information Act, 5 U.S.C. § 552, mandates a policy of broad disclosure of government documents. When a request is made, an agency may withhold a document, or portions thereof, only if the information contained in the document falls within one of nine statutory exemptions to the disclosure requirement of 5 U.S.C. § 552(a)(3). *Church of Scientology of California* v. *U.S. Department of the Army*, 611 F.2d 738, 741-42 (9th Cir. 1979). The burden remains on the Government to establish exempt status, and the nine exemptions are to be narrowly construed. *See Department of Air Force* v. *Rose*, 425 U.S. 352, 360-61 (1976); *Church of Scientology of California*, 611 F.2d at 742-43.

Under Exemption 3, an agency is not required to disclose matters:

> specifically exempt from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave to discretion on the issue, or (B) establishes particular criteria for withholding offers to particular types of matters to be withheld[.]

5 U.S.C. § 552(b)(3).

In asserting the applicability of Exemption 3, the BEA relied upon 26 U.S.C. § 6103, which provides

that "return information" shall be confidential. The 1976 amendment to § 6103 (the "Haskell Amendment"), in effect at the time the BEA denied the Longs' request for records, provides that return information does "not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." 26 U.S.C. § 6103(b)(2) (1976).

In *Long* v. *Internal Revenue Service*, 596 F.2d 362, 365 & n.2 (9th Cir. 1979), we analyzed the applicability of § 6103, as amended, in evaluating the IRS's assertion that Exemption 3 prohibited disclosure of the TCMP data there at issue. We held that § 6103 did not categorically exempt all return information data, but barred disclosure only of data that identify particular taxpayers.

> As noted, it is the clear purpose of section 6103 to protect the privacy of taxpayers. At the same time the amendment demonstrates a purpose to permit the disclosure of compilations of useful data in circumstances which do not pose serious risks of a privacy breach.

Id. at 368. We remanded the case to the district court to determine "whether disclosure of TCMP source data entails a significant risk of indirect identification," noting

> that with respect to the tax model, there is a similar risk that disclosure of the information will permit indirect identification, yet the administrative practice of the Internal Revenue Service has been to release such information. In evaluating the degree of the risk of disclosure from TCMP source material, it will be helpful

> to compare the risk that the IRS has found acceptable with respect to the tax model.

Id. at 367.[4]

This decision narrowly frames the Exemption 3 issue before us. To avoid disclosure, the BEA's burden at trial would be to show that disclosure of the redacted TCMP data in its possession would pose serious risks of indirect identification of the individual taxpayers who are the subject of the TCMP source material. Moreover, any such risk must exceed the risk of indirect identification of taxpayers who are the subject of Tax Model data. Because the Tax Model and TCMP data are different only in that the Tax Model data shows only reported items and the TCMP data shows both reported items and the amounts the IRS has determined should have been reported, to succeed, the BEA would have to show that this addition of amounts determined to be correct would be the cause of a serious risk of privacy breach. This is the standard against which we review the district court's grant of summary judgment.

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[4] The Internal Revenue Service prepares numerous "tax models," which are like the TCMP samples of taxpayers, except that no audit is necessarily done on those taxpayers included in the tax models. Tax Models are prepared for different years, different geographic areas, and different types of taxpayers or returns. The models each contain the figures from actual individual returns, item-by-item. These returns are put on computer tapes by the IRS and are used to formulate tax policy. They are referred to as models because they are statistical samples which can be "blown up," like TCMP, to represent the entire population. These tax model tapes are regularly made available to the public with the taxpayers' identities deleted.

The BEA has devoted only a minor portion of its argument on appeal to the Exemption 3 claim. The BEA argues that the decision in *Long* v. *Internal Revenue Service*, 596 F.2d 363 (9th Cir. 1979), is wrong. The BEA also contends that the district court erred in ordering release of the TCMP tapes without an examination, as to their having "possible indirect identifiers," because this constituted a material issue of fact rendering summary judgment inappropriate.

The Longs counter with two arguments. They assert that the BEA waived the Exemption 3 defense because it failed to specify any particular FOIA exemption in its answer. They also assert that both they and the BEA submitted evidence showing that taxpayers' identities were protected by deletions of identifying items from the TCMP tapes.

The BEA's argument that our prior decision in the *IRS* case was wrong need not detain us long. Such an argument would be appropriate only upon en banc review. Such review has been once denied.

As to the Longs' argument that the BEA's answer was defective, we determine that the issue has been waived. It is undisputed that the BEA has the burden of specifying any exemption claimed in its answer as an affirmative defense. However, in this case, the administrative denials of the Longs' request for records referred to Exemption 3 and 26 U.S.C. § 6103. Further, the case proceeded on this theory throughout. The Exemption 3 issue having been litigated by the implied consent of the parties, it is too late for the Longs to raise the issue of the BEA's defective pleading.

The critical issue then is whether a material issue of fact existed on the indirect identifier issue. We

conclude that on the record before us no such issue existed and, therefore, the grant of summary judgment was proper.

A movant is entitled to summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Bieghler* v. *Kleppe*, 633 F.2d 531 (9th Cir. 1980). The moving party has the burden of demonstrating the absence of a genuine issue of material fact. *Id.* Even under the FOIA, the burden remains on the movant to establish the absence of genuine factual disputes, regardless of where the burden would lie at trial. *See Weisberg* v. *U.S. Department of Justice*, 627 F.2d 365, 368 & n.4 (D.C. Cir. 1980).

If the moving party meets this burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support his legal theory. *Commodity Futures Trading Comm'n* v. *Savage*, 611 F.2d 270 (9th Cir. 1979). The opposing party cannot stand on his pleadings once the movant has submitted affidavits or other similar materials. Similarly, legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd.* v. *Boeing Co.*, 585 F.2d 946 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Conclusory affidavits and affidavits that do not affirmatively show personal knowledge of "specific facts" are insufficient. *Id.*; *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir.

1980). We are mindful that in determining whether summary judgment is proper, the court is to draw all inferences of fact in the light most favorable to the party opposing the motion. *Sankovich* v. *Life Insurance Co. of North America*, 638 F.2d 136 (9th Cir. 1981).

We find that the Longs met their initial burden and that the BEA failed to rebut that showing. In the Longs' request for interrogatories, they sought information on the issue whether the TCMP tapes "otherwise identif[ied] a particular taxpayer." The BEA's answers merely stated "no name or taxpayer identification number." Susan Long's declaration verified the core record layout provided by the IRS, which stated in boldface lettering:

> TAXPAYER IDENTIFICATION INFORMATION HAS BEEN REMOVED SO THAT BASE FILE CAN BE PROVIDED TO OUTSIDE GOVERNMENT AGENCY OR OTHER ENTITY.

Even Swartzwelder's affidavit submitted in opposition to the motion stated that the deletions were made for the purpose of "providing additional safeguards against a *potential* invasion of privacy interest . . . ." (Emphasis added.)

Given this showing, it was incumbent upon the BEA to show affirmatively, by way of affidavit, a significant risk of indirect identification. On the record before us, all we have are conclusory allegations contained in the supporting legal memorandum in opposition to the motion and the affidavit of Robert Parker, which shows that he had no personal knowl-

edge of any indirect identifier problem—a matter confirmed by his deposition. Indeed, even at oral argument, the BEA's counsel stated that the BEA had not yet determined whether any such indirect identifier problem was present.

Given the convincing presentation by the Longs, the BEA was obligated to bring to the district court's attention some affirmative indication that its version of the relevant facts was not fanciful. This the BEA failed to do. Summary judgment was proper, and the grant of injunctive relief warranted.

IV. DENIAL OF LEAVE TO AMEND

Fed. R. Civ. P. 15(a) provides that leave to amend is to be "freely given when justice so requires." Factors to be considered by the district court in determining whether to grant or deny such leave include whether there has been undue delay, bad faith, or a repeated failure to cure deficiencies, and whether amendment would be futile or cause undue prejudice to the opposing party. *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). The decision, however, rests in the sound discretion of the district court, and will not be overturned on appeal absent a clear showing of an abuse of discretion. *See id.; Howey* v. *United States*, 481 F.2d 1187 (9th Cir. 1973); *Komie* v. *Buehler Corp.*, 449 F.2d 644 (9th Cir. 1971). Our task is not to review the district court's decision de novo.

The record, in particular the court's order of February 6, 1981, shows that the district denied amendment because it found the length and nature of the BEA's delay to be excessive and unreasonable and because it found that any further delay would seriously prejudice the Longs by causing the loss of

Susan Long's research funding. The record before us amply supports this determination; there was no abuse of discretion.

The length of the BEA's delay was certainly excessive. The motion to amend the answer was not made until approximately 34 months after the filing of the Longs' FOIA complaint, until approximately 23 months after the filing of the Longs' motion for summary judgment, and only after the tapes had been ordered released. Moreover, the Government had been asserting the Exemption 7(E) defense for well over a year in the *IRS* proceedings involving similar but more comprehensive TCMP data, and cannot assert either that there was a recent change in the law or that new facts were present so as to justify its belated request for amendment.

Moreover, our determination that the request came too late is supported by the nature of the underlying proceedings. The FOIA mandates that all such lawsuits be speedily pursued and resolved. The FOIA gives the Government only thirty days to file its answer and requires that cases "shall be assigned for hearing and trial at the earliest practicable date and expedited in every way." 5 U.S.C. § 552(a)(4)(C), (D). Congress has expressly recognized that information is "likely to be a perishable commodity, and in many cases these procedural delays by Government attorneys—whether or not made in good faith—may result in substantive damage to plaintiff's case." *See* H. R. Rep. No. 1419, 92d Cong., 2d Sess. 74 (1972).

In a FOIA case, delay by the Government in raising defenses should be particularly disfavored. The Government should not be permitted to try its theories seriatim absent the most compelling and excusable circumstances. We agree with the statement by the District of Columbia Circuit:

> The interests of judicial economy and finality militate against a court's tolerating a piecemeal approach by a party. This court has accordingly directed that agencies not make new exemption claims to a district court after the judge has ruled in the other party's favor. *See Grumman Aircraft Engineering Corp.* v. *Renegotiation Bd.*, 482 F.2d 710, 721-22 (D.C. Cir. 1973) (upholding denial of motion for rehearing), *rev'd on other grounds*, 421 U.S. 168, 95 S. Ct. 1491, 44 L. Ed. 2d 57 (1975).

Holy Spirit Ass'n for the Unification of World Christianity v. *Central Intelligence Agency*, 636 F.2d 838, 846 (D.C. Cir. 1980). Indeed, our strong aversion to such belated requests for amendment has been demonstrated even in non-FOIA cases. *See, e.g.*, *Black* v. *Payne*, 591 F.2d 83 (9th Cir.), *cert. denied*, 444 U.S. 867 (1979); *Jackson* v. *American Bar Ass'n*, 538 F.2d 829 (9th Cir. 1976); *see also Freeman* v. *Continental Gin Co.*, 381 F.2d 459, 469-70 (5th Cir. 1967). It makes no difference that it is the Government here rather than a private party that seeks amendment. Congress has made the Government answerable as a defendant; the Government is obligated to abide by the same prescribed rules as any other litigant.

The district court did not abuse its discretion in also determining that the nature of the BEA's delay was unreasonable. The BEA asserts, in essence, that it was justified in failing to amend any sooner because it thought of this case as mere surplusage to the earlier-filed *IRS* action. Notably, however, the BEA never moved to consolidate the two cases until after the grant of summary judgment and after denial of leave to amend. The BEA does not have

the omnipotent power to decide which case is to be controlling and to decide not to try a case because in *its* view the case is collateral to another proceeding. The record here is replete with evidence that the Longs did not share the BEA's view that the *BEA* action was collateral to the *IRS* proceedings and that the Longs continually urged the district court to act on their pending motion for summary judgment. The BEA's claim of surprise by the grant of summary judgment is not well taken. The nature of the BEA's delay was inexcusable and contrary to the purposes of the FOIA.

Turning to the issue of prejudice, the record showed that Susan Long would suffer undue prejudice by the delay that amendment of the answer would cause. The harm to her ability to secure grants for her research and, concommitantly, her ability to advance her career as an instructor and social scientist was clear on the record.

The BEA argues that any prejudice to Susan Long "pales by comparison to the prejudice the Government would experience if it must give up the documents at issue without a full hearing on the merits." The BEA, however, did not clearly press this point in its January 12 motion for amendment. Although the BEA did submit affidavits to the district court, which had previously been filed in the *IRS* case, the affidavits did not specifically and independently address the impact of the release of the tapes *here* at issue and the allegations of harm to IRS law enforcement activities were vague and conclusory. Moreover, nothing in the BEA's accompanying legal memorandum even addressed the amendment issue as a separate matter.

Even considering the BEA's Rule 60(b) motion for reconsideration of denial of leave to amend, which

addressed with somewhat greater specificity the allegations of harm to the Government's law enforcement program, we are not persuaded that the district court abused its discretion in refusing to vacate its prior orders. We note, in addition, that this claim of harm is hotly disputed.[5] We might be intrigued by the law enforcement argument on a different record, but are constrained here by the BEA's inexcusable failure to make that record. Moreover, we find the Government's allegations that irreparable harm will result from release of the tapes difficult to credit in light of the BEA's failure to take even the most basic steps to raise the issue in the district court.

V. CONCLUSION

For the reasons set forth above, we AFFIRM the four rulings of the district court before us.

We have also determined that plaintiffs are entitled to an award of attorney fees and costs in the proceedings below and on appeal and REMAND the case to the district court to determine those amounts. *See* 5 U.S.C. § 552(a)(4)(E).

---

[5] The BEA has asserted that release of the data would lead to disclosure of investigatory techniques and procedures and would risk circumvention of the IRS's law enforcement activities. The BEA contends that release of the source data would be "nothing less than supplying a blueprint" for tax avoidance, *see* Appellant's Brief at 9, because anyone knowledgeable in statistics could develop a DIF scoring system similar to formulae used by the IRS to score returns for their audit potential. Susan Long has asserted, on the other hand, that the allegations of harm are inapplicable because the IRS presently screens returns for audit using DIF formulae constructed from Cycle 6 data and, in a lengthy discussion of statistical procedures, that the IRS's DIF system cannot be reconstructed in a way that will harm the IRS's enforcement activities.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-3090

DC: CV 78-176 WTMcG
Western Washington (Seattle)

SUSAN B. LONG and PHILIP H. LONG,
PLAINTIFFS-APPELLEES

vs.

BUREAU OF ECONOMIC ANALYSIS,
United States Department of Commerce,
DEFENDANT-APPELLANT

Filed May 4, 1981

ORDER

Before: TANG, SKOPIL and CANBY, Circuit Judges.

Upon due consideration, the court issues the following order:

(1) The supplemental affidavit of Fred Cox is ordered filed.

(2) The district court's orders of December 31, 1980, January 12, 1981, January 15, 1981, and February 6, 1981 are appealable and are properly before the court at this time.

(3) The district court did not err in granting partial summary judgment for plaintiffs and the injunction requiring release of the computer tapes at issue was therefore proper.

(4) The district court did not abuse its discretion in denying the Bureau of Economic Analysis' subsequent motion for leave to amend its answer to assert additional defenses or in denying the Bureau's motions for reconsideration. As to the amendment issue, there was undue delay and prejudice. The Bureau's argument about the law enforcement component of the Taxpayer Compliance Measurement Program gives us cause for concern, but this argument was not brought properly before the district court nor before us on the record.

(5) On the basis of the record before us and for the reasons set forth above, we AFFIRM.

(6) Appellees are entitled to an award of attorney fees and costs, both on this appeal and in the proceedings below 5 U.S.C. § 552(a)(4)(E). The district court shall determine the amounts due.

(7) Because Susan B. Long will be irreparably harmed by any further delay, exceptional circumstances are present which warrant immediate issuance of the mandate. No petition for rehearing will be entertained, and the mandate shall issue forthwith. *See* Fed. R. App. P. 2, 41(a).

(8) A written opinion setting forth the basis of this court's order will follow in due course.

al 4/30/81

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
Seattle, Washington 98104

December 31, 1980

Walter T. McGovern
Chief Judge
Mr. Stephen K. Strong
Bendich, Stobaugh & Strong
Attorneys at Law
2111 Smith Tower
Seattle, Washington 98104

RE: Long v. Bureau of Economic Analysis
Cause No. C78-176M

Dear Mr. Strong:

The Court is still attempting to catch up on some of its backlog of work occasioned by the large quantity of filings in the district, the paucity of authorized judgeships, the death of Judge Morell E. Sharp, and the trial of two very long, complex cases during this calendar year.

Today I took up the file in the above-captioned case. I have directed the Clerk to make a minute entry evidencing the Court's ruling granting your client's motion for summary judgment, which motion was filed on February 20, 1979. The Ninth Circuit ruling of May 2, 1979 in *Long* v. *IRS*, No. 76-3734 is controlling.

I apologize for the long delay!

Yours truly,

/s/ Walter T. McGovern
WALTER T. MCGOVERN

cc: Mr. Charles Pinnell
WTM/bwt

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C78-176M

SUSAN B. LONG and PHILIP H. LONG,
PLAINTIFFS

v.

BUREAU OF ECONOMIC ANALYSIS,
UNITED STATES DEPARTMENT OF COMMERCE,
DEFENDANT

[Filed January 12, 1981]

INJUNCTION

Plaintiffs filed this action to obtain copies under the Freedom of Information Act, 5 U.S.C. § 552, of computer data tapes maintained by the Bureau of Economic Analysis (BEA) containing data from the Taxpayer Compliance Measurement Program, Phase III, Cycles 1-5. The Internal Revenue Service prepared the tapes for the use of the BEA and it deleted individual identities before providing the tapes to the BEA.

Plaintiffs moved for partial summary judgment on February 20, 1979, seeking an order determining whether the tapes are disclosable and enjoining the BEA from withholding the tapes. The plaintiffs are entitled to summary judgment. The decision is controlled by *Long* v. *U.S. Internal Revenue Service*, 596 F.2d 362 (9th Cir. 1979), *cert. denied* 100 S.Ct. 1851 (1980), where the Ninth Circuit held that this information is disclosable under the Freedom of Information Act and not subject to withholding under 26 U.S.C. § 6103, when items identifying specific taxpayers are deleted. Accordingly, the Court enters the following injunction.

The Bureau of Economic Analysis shall make copies of its computer tapes containing data from the Taxpayer Compliance Measurement Program and provide them to Dr. Susan B. Long on or before January 30, 1981. The tape copies shall be made on unlabeled 9-track IBM-compatible tapes, up to 6250 density. A reasonable fee for copying the tapes may be charged or waived by the BEA, in accordance with 5 U.S.C. § 552(a)(4)(A).

The terms of this injunction shall be carried out by the Bureau of Economic Analysis and its employees. The Director of the BEA and Robert Parker, Chief, National Income and Wealth Division of the BEA, and their successors in office, shall be responsible for complying with the injunction.

Other issues in this action, including whether plaintiffs are entitled to an award of attorney's fees, shall be determined at a later date.

DATED this 12th day of January, 1981.

/s/ Walter T. McGovern
United States District Judge

Presented by:

BENDICH, STOBAUGH & STRONG

/s/ Stephen K. Strong
STEPHEN K. STRONG
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Date: January 15, 1981

Steven K. Strong
Charles Pinnell

Cause No. C78-176M

SUSAN B. LONG, ET AL., PLAINTIFFS

v.

BUREAU OF ECONOMIC ANALYSIS, ET AL., DEFENDANTS

The Court, after duly considering the motion(s) in the above entitled cause, has ruled as follows:

Defendant BEA's motions (1) to reconsider the Court's order of December 31, 1980, granting summary judgment to the Plaintiff's and (2) to vacate the partial summary judgment, and (3) to stay further proceedings in this action pending a resolution of Cause No. C75-228M, is hereby DENIED. Enter Order striking defendants' motion for protective order as moot on advice of U.S. Attorney.

The Clerk has entered a minute entry in the above entitled cause consistent with the ruling(s) of the Court.

BRUCE RIFKIN
Clerk

By /s/ Charles Buchanan
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C78-176M

SUSAN B. LONG and PHILIP H. LONG, PLAINTIFFS

v.

BUREAU OF ECONOMIC ANALYSIS,
UNITED STATES DEPARTMENT OF LABOR, DEFENDANT

[Filed February 6, 1981]

ORDER

THIS MATTER comes on for consideration before the undersigned Judge of the above-entitled court on defendant's motions under Federal Rules of Civil Procedure 15, 60 and 62. These motions include one to vacate the Court's order of January 12, 1981, one to reconsider the Court's denial of leave to amend defendant's answer and one to stay the proceedings.

The Court having considered the files, records and memoranda relevant to these issues hereby denies defendant's motions in chief, but grants a ten day stay of the January 12th Order pending consideration in the Ninth Circuit Court of Appeals.

On February 20, 1979, plaintiffs filed a motion for summary judgment seeking the release of certain tapes in defendant's custody, pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

In May 1979, while plaintiffs' summary judgment motion was still pending in the case, the Ninth Circuit Court of Appeals remanded the case of *Long* v. *IRS*, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, —— U.S. ——, 100 S.Ct. 1851 (1980), with directions to this Court to order disclosure of the tapes absent a showing of significant risk of indirect identification

of the particular taxpayers. *Id.*, 596 F.2d at 368-69. The Circuit Court did, however, in the other case, suggest that the government might seek a 7(E) investigative exemption to disclosure. *Id.* at n. 6. As a result of this suggestion, the government sought leave to amend its answer in *Long* v. *IRS*, C75-228M (U.S.D.C. W.D. Wash.), the other case.

The government did not, however, seek to likewise amend its answer in the present action despite the presence of issues identical to those in *Long* v. *IRS*. It was only after this Court's decision herein of January 12, 1981, granting plaintiffs' motion for partial summary judgment, that the government took any action. At that time, plaintiffs' motion had been outstanding for a period of approximately two years and the decision in *Long* v. *IRS*, 596 F.2d 362 (9th Cir. 1979) had been in effect for a year and a half.

The length and nature of the government's unreasonable delay leads this Court to deny the government's motions. Defendant's have not set forth any grounds sufficient under Fed.R.Civ.P. 60 for this Court to set aside its January 12th Order. Defendant simply was not timely. For the same reason, this Court, on reconsideration, denies defendant's motion to amend the answer under Fed.R.Civ.P. 15(a).

This Court further denies defendant's motion to stay the Court's injunction until the Court reaches a decision in *Long* v. *IRS*, C75-228M (U.S.D.C. W.D. Wash.). Such a stay would seriously prejudice plaintiffs by causing the loss of their research funding. In comparison, defendant has not shown any evidence of irreparable harm which will result from the release of the tapes. Furthermore, under the answer as it now stands, defendant's likelihood of success on the merits is virtually foreclosed by *Long* v. *IRS*, 596 F.2d 362 (9th Cir. 1979).

Therefore, let it be ordered, adjudged and decreed that defendant's motions are hereby denied, save and except that this Court grants a ten day stay effective through February 16, 1981, to permit appeal to the Ninth Circuit.

DATED this 6th day of February, 1981.

/s/ Walter T. McGovern
WALTER T. MCGOVERN
Chief
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-3090

DC CV 78-0176 WTMcG

SUSAN B. LONG AND PHILIP H. LONG,
PLAINTIFF/APPELLEE

vs.

BUREAU OF ECONOMIC ANALYSIS,
UNITED STATES DEPARTMENT OF COMMERCE,
DEFENDANT/APPELLANT

Appeal from the United States District Court
for the Western District of Washington (Seattle)

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 4, 1981

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-720

BUREAU OF ECONOMIC ANALYSIS,
UNITED STATES DEPARTMENT OF COMMERCE,
PETITIONER

v.

SUSAN B. LONG AND PHILIP H. LONG

ORDER

UPON CONSIDERATION of the application of the Solicitor General,

IT IS ORDERED the [*sic*] the order of the United States District Court for the Western District of Washington, No. C78-176M, filed January 12, 1981, be, and the same is hereby, stayed pending the receipt of a response and further order of the undersigned or the Court.

/s/ William H. Rehnquist
WILLIAM H. REHNQUIST
Associate Justice of the Supreme Court of the United States

Dated this 23rd
day of February, 1981.

SUPREME COURT OF THE UNITED STATES

No. A-720

BUREAU OF ECONOMIC ANALYSIS,
UNITED STATES DEPARTMENT OF COMMERCE,
APPLICANT

v.

SUSAN B. LONG AND PHILIP H. LONG

ORDER

UPON FURTHER CONSIDERATION of the application of the Solicitor General, the response filed thereto and the reply of the Solicitor General,

IT IS ORDERED that the stay heretofore entered by the undersigned on February 23, 1981 be, and the same is hereby, vacated and the application for stay is denied in accordance with the memorandum opinion filed this date.

/s/ William H. Rehnquist
WILLIAM H. REHNQUIST
Associate Justice of the Supreme
Court of the United States

Dated this 3rd
day of March, 1981
12:50 E.S.T. at
Washington, D.C.

SUPREME COURT OF THE UNITED STATES

No. A-720

BUREAU OF ECONOMIC ANALYSIS,
UNITED STATES DEPARTMENT OF COMMERCE,
APPLICANT

v.

SUSAN B. LONG AND PHILIP H. LONG

[March 3, 1981]

ON APPLICATION FOR STAY

JUSTICE REHNQUIST, Circuit Justice.

Applicant Bureau of Economic Analysis, a division of the United States Department of Commerce, seeks to stay an order of the United States District Court for the Western District of Washington ordering applicant, pursuant to the Freedom of Information Act, 5 U.S.C. § 552, to turn over to respondents certain information regarding tax audit standards. The procedural history of this case is somewhat confusing. In 1975 respondents commenced an action against the Internal Revenue Service to obtain certain data. Respondent prevailed in that suit and the Government appealed to the Court of Appeals for the Ninth Circuit. While that action was pending, respondents commenced this action in the District Court against applicant to obtain similar data in its possession and, on February 20, 1979, moved for summary judgment. In May 1979, the Ninth Circuit ruled against the Government, *Long* v. *Internal Revenue Service*,

596 F. 2d 362 (CA9 1979), cert. denied, 100 S. Ct. 1851 (April 28, 1980), but remanded the case so that the Government could raise certain additional defenses. On October 17, 1980, the Government on remand did indeed amend its answer to raise the additional defenses. Significantly, however, the Government did not amend its answer in *this* case. On January 12, 1981, the District Court entered summary judgment against applicant on the ground of its "unreasonable delay" in amending its answer to respondents' complaint and ordered that the sought-after information be disclosed. The Court of Appeals for the Ninth Circuit has declined to stay the District Court's order.

In its application for a stay, the Government asserts that it is likely to prevail on the merits and that it will suffer irreparable harm if the tax information is disclosed. Although I express no views as to the probability of this Court granting a petition for certiorari should applicant lose its appeal to the Court of Appeals for the Ninth Circuit, I think if Congress makes the Government answerable as a defendant in the courts of the United States, the Government is obligated to abide by the rules prescribed for it as a litigant. It is my view that the Government, by failing to amend its answer in this case for more than a year and a half after the Ninth Circuit's decision in *Long* v. *Internal Revenue Service*, rendered itself liable for summary judgment. The Government argues that any delay was not unreasonable, since it wrote a letter to the District Court on October 16, 1979 saying that it would be inappropriate to render summary judgment in this case until a final resolution of *Long* v. *Internal Revenue Service*. But the U.S. Attorney's two paragraph letter falls well short

of an amendment of its answer in this case. Accordingly, I am unwilling to exercise my authority as Circuit Justice at this stage of the litigation and stay the order of the United States District Court for the Western District of Washington.

Accordingly, the temporary stay heretofore granted by me on February 23, 1981, is vacated, and the application for stay is denied.

SUPREME COURT OF THE UNITED STATES

No. A-720

BUREAU OF ECONOMIC ANALYSIS,
UNITED STATES DEPARTMENT OF COMMERCE,
APPLICANT

v.

SUSAN B. LONG AND PHILIP H. LONG

ORDER

UPON CONSIDERATION of the application of the Solicitor General, the opposition filed thereto and the reply of the Solicitor General,

IT IS ORDERED that the order of the United States District Court for the Western District of Washington, No. C78-176M, filed January 12, 1981, be, and the same is hereby, stayed pending further order of the undersigned or the Court.

/s/ John Paul Stevens
JOHN PAUL STEVENS
Associate Justice of the Supreme Court of the United States

A true copy
ALEXANDER L. STEVAS

Test:

Clerk of the Supreme Court
of the United States

By /s/ Patricia G. Dean
Deputy

[Seal]

Dated this 5th
day of March, 1981

ORDER
LIST

MONDAY, MARCH 9, 1981

ORDERS IN PENDING CASES

A-720 *Bureau of Economic Analysis, United States Department of Commerce* v. *Susan B. Long and Philip H. Long.*

The application for stay presented to Justice Stevens and by him referred to the Court is granted. The order of the United States District Court for the Western District of Washington, No. C78-176M, filed January 12, 1981, is stayed pending disposition of the appeal currently pending before the United States Court of Appeals for the Ninth Circuit, case No. 81-3090.

SUPREME COURT OF THE UNITED STATES

No. A-915

BUREAU OF ECONOMIC ANALYSIS,
UNITED STATES DEPARTMENT OF COMMERCE,
PETITIONER

v.

SUSAN B. LONG AND PHILIP H. LONG

ORDER

UPON CONSIDERATION of the application of the Solicitor General and the response filed thereto,

IT IS ORDERED that execution and enforcement of the orders of the United States Court of Appeals for the Ninth Circuit, case No. 81-3090, filed May 4, 1981, and case No. 81-7301, filed May 12, 1981, be, and the same are hereby, stayed pending further order of the undersigned or of the Court.

/s/ William H. Rehnquist
WILLIAM H. REHNQUIST
Associate Justice of the Supreme
Court of the United States

A true copy
Test:

ALEXANDER L. STEVAS
Clerk of the Supreme Court
of the United States

By /s/ Frances J. Lorton
Chief Deputy

Dated this 14th
day of May, 1981.

ORDER
LIST

MONDAY, JUNE 1, 1981

ORDERS IN PENDING CASES

A-915 *Bureau of Economic Analysis, United States Department of Commerce* v. *Susan B. Long and Philip H. Long*

The application for stay presented to Justice Rehnquist and by him referred to the Court is granted. The order heretofore entered by Justice Rehnquist on May 14, 1981 is continued pending the timely filing and disposition of a petition for a writ of certiorari.

APPENDIX E

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6103 [as amended by Section 1202(a), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1667 and Section 701 of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172, 340, to apply to disclosures after July 19, 1981]. CONFIDENTIALITY AND DISCLOSURE OF RETURNS AND RETURN INFORMATION.

(a) *General Rule.*—Returns and return information shall be confidential, and except as authorized by this title—

(1) no officer or employee of the United States,

(2) no officer or employee of any State or of any local child support enforcement agency who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii) or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

(b) *Definitions.*—For purposes of this section—

* * * * *

(2) *Return information.*—The term "return information" means—

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

* * * * *

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

* * * * *

(j) *Statistical Use.*—

(1) *Department of Commerce.*—Upon request in writing by the Secretary of Commerce, the Secretary shall furnish—

(A) such returns, or return information reflected thereon, to officers and employees of the Bureau of the Census, and

(B) such return information reflected on returns of corporations to officers and employees of the Bureau of Economic Analysis,

as the Secretary may prescribe by regulation for the purpose of, but only to the extent necessary in, the structuring of censuses and national economic accounts and conducting related statistical activities authorized by law.

* * * * *

(4) *Anonymous form.*—No person who receives a return or return information under this subsection shall disclose such return or return information to any person other than the taxpayer to whom it relates except in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

* * * * *

5 U.S.C.:

§ 552 [as amended by Section 1, Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54]. *Public information; agency rules, opinions, orders, records, and proceedings*

(a) Each agency shall make available to the public information as follows:

* * * * *

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

* * * * *

(b) [as amended by Section 2, Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561, 1563] This section does not apply to matters that are—

* * * * *

(2) related solely to the internal personnel rules and practices of an agency;

(3) [as amended by Section 5(b), Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241, 1247] specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

* * * * *

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would

* * * (E) disclose investigative techniques and procedure, * * *.

* * * * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information, or limit the availability or records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

APPENDIX F

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

Pursuant to Section 7701(a)(11)(B) of the Internal Revenue Code of 1954, and the authority vested in me by the Secretary of the Treasury in Treasury Department Order No. 150-37 (March 17, 1955), I hereby determine, under Section 6103(b)(2) of the Internal Revenue Code of 1954, as amended by Section 701(a) of the Economic Recovery Tax Act of 1981, with respect to the Internal Revenue Service's Taxpayer Compliance Measurement Program's (TCMP) data on computer tapes, which are at issue in the pending litigation of *Bureau of Economic Analysis* v. *Long*, 646 F.2d 1310 (9th Cir. 1981) (Phase III, Cycles 1-5) and the related litigation of *Internal Revenue Service* v. *Long*, (Phases III and IV and related checksheets) now pending in remand proceedings in the United States District Court for the Western District of Washington, that such data was used or could be used to establish standards for the selection of returns for examination and that the disclosure of such data will seriously impair assessment, collection, and enforcement under the internal revenue laws.

/s/ Roscoe L. Egger, Jr.
ROSCOE L. EGGER, JR.
Commissioner of Internal Revenue

Dated: Aug. 14, 1981
Washington, D.C.

APPENDIX G

97th CONGRESS
1st Session

REPORT
No. 97-201

HOUSE OF REPRESENTATIVES

TAX INCENTIVE ACT OF 1981

REPORT

OF THE

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

ON

H.R. 4242

together with

ADDITIONAL, MINORITY, AND ADDITIONAL DISSENTING VIEWS

JULY 24, 1981.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

* * * * *

2. *Prohibition of disclosure of methods for selection of tax returns for audit (sec. 702 of the bill and sec. 6103 of the Code)*

Present Law

Section 6103 of the Internal Revenue Code governs the disclosure of returns and return information. In general, returns and return information are confidential and may be disclosed only as specifically provided in the Code.[1]

Some doubt has been raised concerning whether the disclosure restrictions cover data derived by the Internal Revenue Service from its Taxpayer Com-

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[1] The term "return" is defined as any tax or information return, declaration of estimated tax, or claim for refund which is required (or permitted) to be filed on behalf of, or with respect to, any person. A return also includes any amendment, supplemental schedule, or attachment filed with the tax return, information return, etc.

"Return information" includes the following data pertaining to a taxpayer: his identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, and tax payments. Also included in the definition of return information is any other data, received by, recorded by, prepared by, furnished to, or collected by the IRS with respect to a return filed by the taxpayer or with respect to the determination of the existence, or possible existence, of liability for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense provided for under the Code. A summary of data contained in a return and information concerning whether a taxpayer's return was, is being, or will be examined or subject to other investigation or processing also is return information. However, data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer is not return information.

pliance Measurement Program (TCMP).[2] This data is used by the IRS to develop variables used to derive scores that are used for the purpose of selecting tax returns for audit.

Reasons for Change

The committee believes that Congress never intended to permit public disclosure of information that would seriously compromise the integrity of the Federal tax system. Furthermore, the committee believes that maintaining the confidentiality of certain data that the IRS uses for establishing its audit techniques outweighs any legitimate public interest

---

[2] In *Susan B. Long and Philip H. Long* v. *United States Internal Revenue Service*, 596 F.2d 362 (9th Cir. 1979), an action under the Freedom of Information Act (FOIA), the court reversed a district court decision denying plaintiff-appellants access to this TCMP data from which the characteristics used to identify particular taxpayers had been deleted. The court based its decision on section 6103(b)(2), which excludes from the definition of protected return information "data in a form which cannot be associated with, or otherwise identify, directly, or indirectly, a particular taxpayer." The court remanded for consideration of whether, *inter alia*, the data even with the identifiers deleted might, nonetheless, be associated with particular taxpayers. On remand, the district court has granted the government leave to amend its original answer and will also consider whether the data is exempted from disclosure under FOIA as investigatory records for law enforcement purposes, 31 U.S.C. 552 (b)(7). Additionally, in *Susan B. Long* v. *Bureau of Economic Analysis*, Civ. No. C78-176M (W. D. Wash., Dec. 31, 1980), aff'd 646 F.2d 1310 (9th Cir. 1981), the plaintiff was granted access, on procedural grounds, to virtually the same data as was at issue in *Susan B. Long and Philip H. Long* v. *United States Internal Revenue Service, supra*. The Service has not released the TCMP data, pending further judicial action.

or benefit to be served by the disclosure of such information. Thus, the committee bill makes it clear that such information (including any such information that is being sought in any pending litigation) is protected under the disclosure provisions of the tax law.

Explanation of Provision

The bill provides that nothing in the tax law, or in any other Federal law, will be construed to require the disclosure of standards used, or to be used, for the selection of returns for examination (or data used, or to be used, for determining such standards), if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws. However, the committee intends that nothing in this provision be construed to limit disclosure of statistical data or other information (other than of the type that could be used by the IRS to determine criteria for selecting returns for examination) to the extent permitted under present law. Thus, any information that is currently made available will continue to be available.

Effective Date

The provision applies to any disclosures after July 19, 1981.

In other words, disclosure of any information that the bill protects will not be permitted after that date.

Revenue Effect

This provision will have no effect on Federal revenues.

97th CONGRESS
1st Session

REPORT
No. 97-215

HOUSE OF REPRESENTATIVES

ECONOMIC RECOVERY TAX ACT OF 1981

AUGUST 1, 1981.—Ordered to be printed

Mr. ROSTENKOWSKI, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 4242]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 4242) to amend the Internal Revenue Code of 1954 to encourage economic growth through reductions in individual income tax rates, the expensing of depreciable property, incentives for small businesses, and incentives for savings, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS; AMENDMENT OF 1954 CODE.

(a) Short Title.—This Act may be cited as the "Economic Recovery Tax Act of 1981".

* * * * *

TITLE VII—ADMINISTRATIVE PROVISIONS

Subtitle A—Prohibition of Disclosure of Audit Methods

SEC. 701. PROHIBITION OF DISCLOSURE OF METHODS FOR SELECTION OF TAX RETURNS FOR AUDITS.

(a) General Rule.—Paragraph (2) of section 6103(b) (defining return information) is amended by adding at the end thereof the following new sentence: "Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws."

(b) Effective Date.—The amendment made by subsection (a) shall apply to disclosures after July 19, 1981.

* * * * *

74. *Confidentiality of certain IRS information*

House bill.—Present law restricts the disclosure of tax returns and return information. However, information that cannot identify any particular taxpayer is not protected under the disclosure restrictions. Because of this, questions have been raised concerning whether the IRS can legally refuse to disclose information which is used to develop standards for auditing tax returns.

The House bill provides that nothing in the tax law, or in any other Federal law, will be construed

*

to require the disclosure of standards used, or to be used, for the selection of returns for examination (or data used, or to be used, for determining such standards), if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws. However, it is intended that nothing in this provision be construed to limit disclosure of statistical data or other information (other than of the type that could be used by the IRS to determine criteria for selecting returns for examination) to the extent permitted under present law. Thus, any information that is currently made available will continue to be available.

Senate amendment.—No provision.

Conference agreement.—The conference agreement follows the House bill.

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 380443 841

Opposition

Office-Supreme Court, U.S.
FILED
SEP 23 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-397

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

BUREAU OF ECONOMIC ANALYSIS,
UNITED STATES DEPARTMENT OF COMMERCE,
Petitioner,

v.

SUSAN B. LONG AND PHILIP H. LONG,
Respondents.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ABCD AT CRAFTSMAN PRESS, SEATTLE

QUESTION PRESENTED

The question presented is whether the Court should "remand the case to [the court of appeals] for reconsideration in light of Section 701 of the Economic Recovery Tax Act of 1981." See petition for certiorari, p. 8.

TABLE OF CONTENTS

	Page
Respondents' Position	1
Statement of the Case	1
Reasons for Granting the Petition . .	3
Conclusion	4

TABLES OF AUTHORITY

Table of Cases

IRS v. Fruehauf Corp., 429 U.S. 1085 (1977) 3

NLRB v. Sear, Roebuck, & Co., 421 U.S. 132 (1975) 3

Other Authority

H.R. Rep. No. 97-201, 97th Cong., 1st Sess. (1981). 2

NO. 81-397

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

BUREAU OF ECONOMIC ANALYSIS,
UNITED STATES DEPARTMENT OF COMMERCE,
Petitioner,

v.

SUSAN B. LONG AND PHILIP H. LONG,
Respondents.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' POSITION

The respondents concur with the request for a remand to permit reconsideration.

STATEMENT OF THE CASE

Respondents do not agree with the statement of facts in the petition.

Section 701 of the Economic Recovery Tax Act of 1981 does not apply to the records sought in this case. The section permits withholding of "standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards," where disclosure would "seriously impair" tax assessment, collection or enforcement. The legislative history of Section 701 states Congress' intent that the amendment could be applied to pending cases containing "any such information." Congress did not decide whether such information is involved in this or any other case. H.R. Rep. No. 97-201, 97th Cong., 1st Sess. (1981), p. 239.

The record establishes that no information covered by Section 701 is sought in this case.

REASONS FOR GRANTING THE PETITION

Since Congress enacted a statutory amendment after the court of appeals made its decision, and the parties disagree on the effect of this amendment, the most appropriate course is to remand the case to the court of appeals to permit reconsideration. This action was taken in previous Freedom of Information Act cases where amendments occurred after the decision of the court of appeals. Thus, in NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162-65 (1975), the Court remanded a case to the court of appeals to consider whether an intervening Freedom of Information Act amendment affected the outcome. Similarly, in IRS v. Fruehauf Corp., 429 U.S. 1085 (1977), the Court remanded a Freedom of Information case to the court of appeals for reconsideration in light of a 1976 amendment to the disclosure provisions of the Internal Revenue Code.

The facts of this case and the prior proceedings in this and related cases are quite complicated. Consequently, it would be difficult to set forth here all the considerations affecting the determination whether Section 701 applies to the records sought by respondents. Since respondents agree with the BEA's request for a remand to the court of appeals, it is unnecessary for this Court to consider the effect of Section 701 at this time. The Court should remand the case so that the court of appeals can make this determination in the first instance.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari and remand the case to the court of appeals

for reconsideration in light of Section 701 of the Economic Recovery Tax Act of 1981. On the other hand, if the Court wishes to decide the merits of the BEA's argument concerning the applicability of Section 701 to this case, the petition should be granted, and briefs submitted on the merits.

Respectfully submitted,

STEPHEN K. STRONG
BENDICH, STOBAUGH & STRONG
Counsel for Respondents